



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 28, 2003

Mr. Philip Fraissinet
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711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR2003-2115

Dear Mr. Fraissinet:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178650.

The Santa Fe Independent School District (the "district"), which you represent, received a request for "all information and documents regarding attorney's fees and costs in *Ward* [*v. Santa Fe Independent School District*], whether yet in invoice form or not, through January 9, 2003." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code, Rule 503 of the Texas Rules of Evidence, Rule 501 of the Federal Rules of Evidence, Rule 192.5 of the Texas Rules of Civil Procedure, Rule 26 of the Federal Rules of Civil Procedure, and Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted to this office by the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we will address the comments submitted to this office by the requestor. The requestor states that "the information being presently requested has already been ordered to be produced under OR2002-6753, and the recent request is, at most, a request of compliance with the previous Order and as to the period that has lapsed since the previous order, an extension of OR2002-6753." However, our ruling in Open Records Letter No. 02-6753 (2002) is only applicable to responsive documents in existence at the time that the district received the initial request for information. Furthermore, we note that the Public Information Act (the "Act") does not require the district to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). Additionally, the Act does not require the district to inform the

requestor if the requested information comes into existence after the request has been made. *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681(Tex. App.–Eastland, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3, 342 at 3 (1982), 87 (1975). Also, the district is not required to comply with a continuing request to supply information on a periodic basis as such information is prepared in the future. See Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Therefore, in regard to information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that you must continue to rely on OR2002-6753 as a previous determination and withhold or release portions of the requested information in accordance with OR2002-6753. See Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, the first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

In regard to the responsive information acquired by the district since the previous request for information, we note that the submitted fee bills are made expressly public by section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, information contained in attorney fee bills must be released under section 552.022 unless it is expressly confidential under other law. Although the district raises sections 552.103 and 552.107 of the Government Code with regard to the requested attorney fee bills, sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, they are not "other law" that makes information confidential for purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege under section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of

Evidence. Additionally, you assert Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are “other law” within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). We note that the supreme court did not hold that the Texas Disciplinary Rules of Professional Conduct, Federal Rules of Evidence, or Federal Rules of Civil Procedure are “other law” within the meaning of section 552.022. Thus, we will determine only whether the attorney fee bills are confidential under Rule 503 or Rule 192.5.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the layer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See*

Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.–Houston [14th Dist.] 1998, no pet.) (Privilege attaches to complete communication, including factual information).

Upon reviewing your arguments and the submitted fee bills, we conclude that you have demonstrated that some of the entries constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. We have marked the submitted information that the district may withhold under Rule 503.

You also contend that information contained in the attorney fee bills is protected by the attorney work product privilege. An attorney's work product is confidential under Rule 192.5. Work product is defined as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

Tex. R. Civ. P. 192.5(a). Accordingly, in order to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* Information that meets the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App. Houston [14th Dist.] 1993, no writ).

You state that the attorney fee bills contain information relating to pending litigation involving the district. You also assert that information pertaining to the pending litigation constitutes privileged attorney work product because the information reveals the attorneys' mental impressions, opinions, conclusions, or legal theories. Based on your representations and our review of the submitted fee bills, we have marked the submitted information that the district may withhold under Texas Rule of Civil Procedure 192.5. All remaining information must be released to the requestor.

In summary we conclude that: 1) you must continue to rely on OR2002-6753 as a previous determination and withhold or release portions of the requested information in accordance with OR2002-6753; and 2) you may withhold the submitted information we have marked under Rule 503 and Rule 192.5. All remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 178650

Enc: Submitted documents

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